IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 05-2268 EMSL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

LARRY EDWARD STEAD,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri
District Court No. 4:04 CR 360 CEJ

The Honorable
United States District, Chief Judge Carol Jackson, Presiding

BRIEF OF DEFENDANT - APPELLANT

Lucy G. Liggett
Assistant Federal Public Defender
Terri L. Breneman, on brief
1010 Market Street - Suite 200
St. Louis, Missouri 63101
(314) 241-1255
ATTORNEY FOR DEFENDANT-APPELLANT

SUMMARY AND REQUEST FOR ORAL ARGUMENT

Mr. Stead brought this appeal to challenge his sentence for escape in violation of 18 U.S.C. § 751(a). Mr. Stead contends that the district court erred by enhancing his sentence based on the court's conclusion that his prior convictions for escape constituted "crimes of violence" within the meaning of U.S.S.G. § 4B1.1. Additionally, Mr. Stead contends that his sentence is unreasonable in that it does not take into consideration the time that he will have to serve based on his status under the now abolished parole regime.

Mr. Stead requests oral argument to address the impact of these issues.

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

CASES CITED

STATUTES CITED

JURISDICTIONAL STATEMENT

This case is an appeal from the judgment and sentence entered by the Honorable Carol E. Jackson, Chief Judge, Eastern District of Missouri.

Appellant pleaded guilty to escape, specifically walking away from Dismiss House, in violation of 18 U.S.C. §751(a). He was sentenced on April 29, 2005 to 46 months imprisonment, consecutive to the sentence he is serving currently, with two years of supervised release.

On May 5th 2005, a Notice of Appeal was timely filed.

To Appellant's knowledge, none of the proceedings below have been reported.

Jurisdiction of the district court was invoked under the criminal laws of the United States, specifically 18 U.S.C. §751(a). Appellant invokes this Court's jurisdiction pursuant to 28 U.S.C. §1291.

STATEMENT OF ISSUES

I. The district court erred in categorizing Mr. Stead's prior convictions as "crimes of violence" in light of the Supreme Court's reasoning regarding the recidivist issue.

Shepard v. United States, 125 S.Ct. 1254 (2005)

Almendarez-Torres v. United States, 523 U.S. 224 (1998)

United States v. Ngo, 2005 WL 1023024 (7th Cir. May 3, 2005)

United States v. Marcussen, 403 F.3d 982 (8th Cir. 2005)

II. The district court erred in counting Mr. Stead's prior escape convictions as violent felonies because the conduct involved did not present a serious potential risk of harm to another person.

Taylor v. United States, 495 U.S. 575 (1990)

United States v. Mohr, 2005 WL 1060574 (8th Cir. (Minn.))

United States v. Nation, 243 F.3d 467 (8th Cir. 2001)

III. The district court's sentence was unreasonable in that it disregarded the additional time Mr. Stead will serve under the abolished parole system prior to his serving the term imposed by the district court.

United States v. Weaver, 920 F.2d 1570 (11th Cir. 1991)

STATEMENT OF THE CASE

Procedural

Mr. Stead was charged in a one count indictment with escape, specifically walking away from Dismiss House on March 9, 2004, in violation of 18 U.S.C. § 751(a). On February 1, 2005, he entered a plea of guilty. The government recommended he receive an adjustment for acceptance of responsibility pursuant to U.S.S.G. §3E1.1. The government also agreed that a four level deduction pursuant to U.S.S.G. §2P1.1(b)(3) was applicable because Mr. Stead escaped custody from a non-secure community corrections center. The Presentence Report stated that the Career Offender guideline was applicable based on prior felony convictions for escape. The district court judge found these prior convictions to be crimes of violence pursuant to the now advisory U.S.S.G. §4B1.1. Based on this calculation, Mr. Stead's guideline range was determined to be 37 to 46 months. On April 29, 2005, the judge sentenced Mr. Stead to 46 months and utilized another advisory guideline, U.S.S.G. §5G1.3(a), to impose his sentence consecutively to his undischarged sentences.

Prior to Mr. Stead's escape from Dismiss House he was serving an aggregate sentence of over twenty-five years under the now abolished parole

system. Absent this conviction, his projected release date from that sentence was April 1, 2011 (via two-thirds, 18 U.S.C. § 4206(d)). He would remain under the Parole Commission's supervision until August 15, 2015.

Facts

Mr. Stead was charged in a one-count indictment that on March 9, 2004 he escaped from custody in violation of 18 U.S.C. § 751(a), specifically that he walked away from Dismas House. Mr. Stead was taken into federal custody on March 17, 2005.

SUMMARY OF ARGUMENT

The district court erred by concluding that Mr. Stead's prior convictions for escape constituted "crimes of violence" pursuant to the Career Offender Guideline. In this case the guideline range jumped from 15 to 21 months to 37 to 46 months. The sharply increased sentencing range was based upon the judge's own finding by a mere preponderance of the evidence. Reliance upon the discredited opinion in *Almendarez-Torres*, 523 U.S. 224 (1998) is improper in that it specifically did not decide the standard of proof required to establish prior convictions. Additionally, when determining whether an offense is a "crime of violence," the Supreme Court set out the process and rationale in *Taylor v. United States*, 495 U.S. 575 (1990). A sentencing court may only look to the statutory definition, not to a list of hypothetical examples that could lead to a potential of serious harm to another. Finally, the district court's sentence is unreasonable because it does not take into consideration the Appellant's unusual situation. He is still completing an aggregated sentence under the abolished parole system and therefore must serve a violator term before he continues with his old sentence, which illustrates the disparity between him and the vast majority of other offenders.

STANDARD OF REVIEW

The court of appeals reviews district court applications of the sentencing guidelines *de novo*. *United States v. Walker*, 393 F.3d 819, 821 (8th Cir. 2005). In an advisory Guideline system, "[t]he courts of appeals review sentencing decisions for unreasonableness." *United States v. Booker*, 125 S.Ct. 738, 767 (2005).

ARGUMENT

I. THE DISTRICT COURT ERRED IN CATEGORIZING MR. STEAD'S PRIOR CONVICTIONS AS "CRIMES OF VIOLENCE" IN LIGHT OF THE SUPREME COURT'S REASONING REGARDING THE RECIDIVIST ISSUE.

Mr. Stead challenges this Court's interpretation of the Supreme Court's application of reasoning concerning the recidivist issue when characterizing a defendant's prior conviction as a "crime of violence." Mr. Stead contends that a factual finding that increases the presumptive sentencing range, made by a mere preponderance of the evidence, violates the holding in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) and *United States v. Booker*, 125 S.Ct. 738 (2005). Although Mr. Stead was sentenced under the now advisory Sentencing Guidelines, the characterization of his prior convictions as "crimes of violence" by the sentencing court ran afoul of the Supreme Court's intentions.

The district court relied upon this Court's recent decision in *United States v. Marcussen*, 403 F.3d 982, 984 (8th Cir. 2005) to justify its ability to make the determination that a prior escape conviction was a crime of violence. Mr. Stead contends that the Supreme Court's analysis and rationale have been misconstrued. This case presents the Eighth Circuit Court with an opportunity to revisit the ability of the sentencing court to make those types

of determinations in light of recent Supreme Court decisions. *See Shepard v. United States*, 125 S.Ct. 1254 (2005).

Reliance upon *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) is not appropriate in a situation such as the one presented here. In that case the defendant argued that the fact of his prior aggravated felony should have been pled in the indictment and determined by a jury. He admitted that he had a prior felony conviction and that it qualified as an aggravated felony. The Court held that the fact of this prior conviction, admitted fully by the defendant, did not have to be pled in the indictment. *Id.* The Court never addressed whether or not the prior conviction met the definition of an aggravated felony or what burden of proof should apply to that determination because that issue was not before the Court.

Almendarez-Torres' prior felony conviction became a "fact" because he admitted it to the Court. There was no discussion on this issue because the defendant freely admitted not only that he had a prior conviction, but that this conviction met the definition of an aggravated felony. The "narrow exception" in *Almendarez-Torres* to the rule in *Apprendi* is that if a defendant admits to a prior conviction for an aggravated felony, the government does not have to plead it in the indictment nor does it need to be found by a jury beyond a

reasonable doubt. 523 U.S. at 243. This is the same type of exception that the Supreme Court discussed in *Blakely*, but in that case the defendant did not admit to additional facts. The *Blakely* Court held that Sixth Amendment rights apply to any fact that increases the penalty range above the maximum authorized by the facts or admitted by the defendant. 124 S.Ct. at 2537 (Emphasis added). Mr. Almendarez-Torres admitted to his prior conviction and its qualification as an aggravated felony. With regard to this issue, it is only those cases where the defendant has not admitted a fact or a jury has not found that fact beyond a reasonable doubt that this Sixth Amendment right to a jury trial is triggered. Mr. Stead never admitted, and no jury found beyond a reasonable doubt, that he has two or more prior convictions that qualify under the Career Offender guideline. The facts in this case are wholly unlike those in *Almendarez-Torres* and therefore that opinion does not govern the outcome nor provide the reasoning needed to address the issue in this case.

Although the Supreme Court has not expressly overruled *Almendarez-Torres*, it seems clear that the Court is merely following its practice of not overruling a prior decision unless that decision's validity is squarely presented. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The *Apprendi*

Court noted, however, that "it is arguable that *Almendarez-Torres* was incorrectly decided and that a **logical application of our reasoning today should apply if the recidivist issue were contested**." *Id.* at 489-90 (footnote omitted)(emphasis added). To make this point even clearer, Justice Thomas stated recently: "*Almendarez-Torres*... has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided." *Shepard*, 125 S.Ct. at 1264 (Thomas, J., concurring in part).

The recidivist issue is being contested here and therefore a logical application of the Supreme Court's reasoning should be utilized. Since the Court decided *Shepard*, other courts have recognized that some types of fact finding by the sentencing court are not authorized by *Almendarez-Torres*. *See United States v. Ngo*, 2005 WL 1023024 (7th Cir. May 3, 2005)(district court's factual finding that Ngo's prior convictions were not part of a common scheme or plan was not authorized by *Almendarez-Torres*). Determining that Mr. Stead's prior escape convictions were "crimes of violence" even though no violence was alleged in the indictment, is impermissible factfinding by the sentencing court in that it goes against the logical application of Supreme Court reasoning. Absent that finding, Mr. Stead's sentencing range is 15 to

21 months. Appellant respectfully requests a remand to the district court for re-sentencing within that range.

II. THE DISTRICT COURT ERRED IN COUNTING MR. STEAD'S PRIOR ESCAPE CONVICTIONS AS VIOLENT FELONIES BECAUSE THE CONDUCT INVOLVED DID NOT PRESENT A SERIOUS POTENTIAL RISK OF HARM TO ANOTHER PERSON.

This appeal allows this Court to revisit its prior holdings that escape is always a crime of violence under U.S.S.G. § 4B1.1. *United States v. Nation*, 243 F.3d 467 (8th Cir. 2001) and *United States v. Abernathy*, 277 F.3d 1048 (8th Cir. 2002). Mr. Stead is aware that one panel of this Court is not free to overrule another panel's decision and has therefore requested an initial hearing *en banc*. *United States v. Prior*, 107 F.3d 654, 660 (8th Cir. 1997). Mr. Stead raises this argument in order to preserve the issue and to challenge the highly expansive approach the Eighth Circuit has adopted in defining "crime of violence" for purposes of sentencing under the Career Offender guideline.

Escape is not one of the specifically enumerated predicate offenses listed in the definition of U.S.S.G. § 4B1.2(a).

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year that –
>
> (1) has the element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves **conduct** that presents a serious potential risk of physical injury to another.

Id. (emphasis added). The Sentencing Commission went on to list several other offenses that would qualify as a "crime of violence" in the application notes.

> "Crime of violence" includes murder, manslaughter, kidnapping aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

U.S.S.G. § 4B1.2, Note 1. It is important to note that the Commission declined to list "escape" as one of the enumerated offenses, yet it did choose to list "extortionate extension of credit." Escape is a fairly common offense that could have been easily added by the Commission over the years. This omission should indicate the reluctance to classify escape as a "crime of violence" when there are many variations. For example, the Commission enumerated <u>forcible</u> sex offenses, not all sex offenses, as crimes of violence. Also, only burglaries of a dwelling are specifically listed. For other burglaries

it is up to the sentencing court to examine the specific statute that was violated. The same logic should apply to prior convictions for escape.

In determining whether a particular offense falls within the provision of a "crime of violence," courts have generally followed a categorical approach which seeks to determine whether the offense in its abstract form presents a serious potential risk of harm. The Tenth Circuit has expressed doubt regarding whether escape should automatically be considered a "crime of violence" where there is no showing that violence actually occurred or was threatened. *United States v. Springfield*, 196 F.3d 1180, 1185 (10th Cir. 1999)(McKay, J., concurring). Similarly, although relief was denied, the Tenth Circuit also found in an unpublished case that the "defendant had presented a strong argument why escape should not constitute a crime of violence when the escape is not from physical custody." *United States v. Ahlenius*, 198 F.3d 259, 1999 WL 909836 * 5 (10th Cir.(Colo)).

The Eighth Circuit, however, has engaged in an elaborate construction of "what if" scenarios to conclude that escape is always a crime of violence within the Career Offender provision. *United States v. Nation*, 243 F.3d 467, 472-73 (8th Cir. 2001). In doing this, the Court has held that the actual conduct of the defendant is not relevant. *Abernathy*, 277 F.3d at 1051. What

is important according to the Court is that the conduct described by the statute of conviction must present a "serious **potential** risk" of harm to others. *Id.* (Emphasis added).

In this case the prior convictions at issue are listed under 18 U.S.C. § 751(a). A reading of this statute reveals that no violence or threat of violence is required to be defined as an "escape." In fact, this statute covers an extraordinary broad range of conduct. An armed breakout from a maximum security prison falls within the gambit of this statute as well as a "walkaway" from a halfway house. *See United States v. Helton*, 127 F.3d 819 (9th Cir. 1997). Even a defendant who fails to show up or is merely late to arrive at a halfway house or treatment center may be prosecuted for "escape" under 18 U.S.C. § 751(a). *United States v. Mendiola*, 42 F.3d 259 (5th Cir. 1994). In looking only to the definition of this statute and the charging documents, the Court should not conclude that a violent felony has occurred unless a serious potential for violence is evident from those sources.

Mr. Stead respectfully submits that this Court has violated the restrictions set out in *Taylor v. United States*, 495 U.S. 575 (1990) in categorizing all escapes as crimes of violence. The *Taylor* Court set out the process and rationale for determining when an unenumerated prior offense

is or is not a predicate "crime of violence" under 18 U.S.C. § 924(e). The definition of "violent felony" in § 924(e) is nearly identical to the definition of "crime of violence" in U.S.S.G. § 4B1.2. *United States v. Sun Bear*, 307 F.3d 747, 753 (8th Cir. 2002). A court deciding a case under one statute will often look to cases decided under the other statute for guidance in determining whether a sentence enhancement should apply. *United States v. Hascall*, 76 F.3d 902, 904-5 (8th Cir. 1996).

The *Taylor* Court explains that the sentencing court may look only to the statutory definition of the prior offense, if it is not one of the enumerated offenses, to see if it presents a serious risk of physical injury to another. In *Sun Bear, supra*., this Court held that stealing a motor vehicle is a crime of violence simply because of what might happen as a result of the offense. In *Nations* and *Abernathy*, the Court likewise held that walkaway "escapes" are crimes of violence because of the possible scenarios that could happen as a result of a defendant's potential actions.

The concern with this approach is that there are innumerable possibilities and scenarios that could be construed, resulting in the conclusion that nearly any crime, including shoplifting, is a crime of violence. The consequences of these hypothetical scenarios are lengthy sentences for the

defendants. This categorical approach has been called into question by this Court regarding burglaries of commercial property. "Certainly, the risk of physical injury exists in nearly every felony. The guidelines, however, focus on whether that risk is a serious one, not just an abstract possibility." *United States v. Mohr*, 2005 WL 1060574, *5, (8th Cir. (Minn.))(Heaney, J., concurring).

Mr. Stead respectfully suggests that the approach set out by the Supreme Court in *Taylor* be followed when evaluating a prior conviction for an escape. Unless the statutory definition or the charging papers allege an element of violence to another person, the court should not engage in hypothetical postulating regarding possible scenarios or conduct which could cause harm to some person, thereby automatically categorizing all escapes as "crimes of violence." This cannot be what the Sentencing Commission intended since it did not list escape as an enumerated offense nor did it list it in the application notes. *See* U.S.S.G. §4B1.2.

The fact that Mr. Stead was convicted for escape in the past is not in dispute. It is clear that two of those convictions were "walkaways" from a halfway house. No violence occurred. Because neither the statutory definition of the escape nor the charging documents make a showing of

violence, the sentencing court should not have determined that Mr. Stead's escape convictions were crimes of violence within the meaning of the Career Offender guideline. The appropriate guideline range is therefore 15 to 21 months and the Appellant respectfully requests a remand for resentencing within this range.

III. THE DISTRICT COURT'S SENTENCE WAS UNREASONABLE IN THAT IT DISREGARDED THE ADDITIONAL TIME MR. STEAD WILL SERVE UNDER THE ABOLISHED PAROLE SYSTEM PRIOR TO HIS SERVING THE TERM IMPOSED BY THE DISTRICT COURT.

The district court utilized U.S.S.G. § 5G1.3(a) to determine that the sentence imposed would run consecutively to Mr. Stead's undischarged term of imprisonment. This determination along with a sentence at the high end

of the advisory sentencing guidelines was unreasonable in that it completely disregarded Mr. Stead's position under the abolished parole system.

Mr. Stead is still serving time on an original aggregate system of over 25 years. According to the Federal Bureau of Prisons, his current projected release date prior to this conviction was April 1, 2011 (via two-thirds, 18 U.S.C. § 4206(d)). Even if granted parole on that date, he would continue to be under the supervision of the Parole Commission until August 11, 2015. Because of Mr. Stead's escape, he will most likely be given a parole violator term. According to 28 C.F.R. § 2.36, an escape conviction would require confinement for 8 to 16 months. This time would not be a part of Mr. Stead's aggregated sentence and would in fact be added on to his parole date of April 1, 2011. The sentence imposed by the district court would not begin to run until after he has completed his parole violator term and his original aggregate sentence. This translates into a sentence that is 8 to 16 months longer than any other defendant who is not under the old parole regime.

Due to this unusual situation, Mr. Stead contends that his sentence is therefore unreasonable. The Eleventh Circuit recognized a similar discrepancy in *United States v. Weaver*, 920 F.2d 1570 (11th Cir. 1991). In that case the Parole Commission imposed an 8 to 16 month violator term on

the defendant for his escape. *Id.* at 1576. The defendant had to serve that term before serving the sentence imposed by the district court. The district court considered this and departed downward, imposing a seven month consecutive sentence even though the sentencing range for the escape was 18 to 24 months. *Id.* The Court of Appeals affirmed and found that in situations such as this one, the Sentencing Guidelines did not take into consideration the parole violator term, thereby taking it out of the heartland. *Id.* A downward departure was warranted to help counteract the Parole Commission's extension of the defendant's parole range. *Id.*

Mr. Stead's sentence of 46 months, which was imposed consecutively to both his violator term and his prior aggregate sentence, is not reasonable. In a post *Booker* sentencing system, this Court must review a defendant's sentence to determine whether it is reasonable in light of the purposes set forth by Congress in 18 U.S.C. §3553(a)(2). A sentence is reasonable if it is "sufficient, but not greater than necessary, to comply with" those purposes. Because the advisory Guidelines are only one of many factors to be considered when imposing a sentence, sentences imposed within the advisory Guideline range are not **per se** reasonable.

The sentencing mandate of §3553(a) requires the district court to examine a greater amount of evidence and engage in different considerations than it did prior to *Booker*. As one district court has observed, the "directives of *Booker* and §3553(a) make clear that courts may no longer uncritically apply the guidelines." *United States v. Ranum*, 353 F.Supp.2d 984, 985 (E.D. Wis. 2005). For that reason, a sentence imposed within the advisory Guideline range cannot be deemed *per se* reasonable. The Sixth Circuit, in rejecting such a *per se* conclusion, noted that such a test "is not only inconsistent with the meaning of 'reasonableness,' but is also inconsistent with the Supreme Court's decision in *Booker*, as such a standard 'would effectively re-institute mandatory adherence to the Guidelines.'" *United States v. Webb*, 403 F.3d 373, 385, n.9 (6th Cir. 2005), quoting *United States v. Crosby*, 397 F.3d 102, 115 (2nd Cir. 2005).

The *Booker* opinion emphasized that a sentencing court needed to follow the mandate of §3553(a) and consider, among other factors, "the nature and circumstances of the offense and the history and characteristics of the defendant." Mr. Stead's medical condition is well documented. He has had two aortic valve replacements due to coronary artery disease. He has also suffered from two strokes and has limited use of his left arm as a result.

These facts are a part of the whole picture that the sentencing court should consider when fashioning a sentence instead of relying solely on the guideline range.

Still another court looked at this issue and came to a very similar conclusion.

> [t]o treat the Guidelines as presumptive is to concede the converse, i.e., that any sentence imposed outside the Guideline range would be presumptively unreasonable in the absence of clearly identified reasons. If presumptive, the Guidelines would continue to overshadow the other factors listed in §3553(a), causing an imbalance in the application of the statute to a particular defendant by making the Guidelines, in effect, still mandatory.

United States v. Myers, 353 F.Supp.2d 1026, 1028 (S.D. Iowa 2005). A sentence can only be reasonable if it is "sufficient, but not greater than necessary" to comply with the purposes of sentencing set forth in §3553(a).

In this case the 46 month consecutive sentence is unreasonable because it is greater than necessary to comply with the purposes of sentencing. Specifically, it did not take into consideration the fact that Mr. Stead is subject to a violator term of 8 to 16 months. A lesser sentence, recognizing the abolished parole system and the violator term he will have to serve, would still adequately reflect the seriousness of Mr. Stead's offense, provide respect for the law, and provide just punishment.

CONCLUSION

WHEREFORE, for the reasons stated above, this case should be remanded to the district court.

Respectfully submitted,

Lucy G. Liggett
Assistant Federal Public Defender
Terri L. Breneman, on brief
1010 Market Street, Suite 200
St. Louis, Missouri 63101
(314) 241-1255

ATTORNEY FOR DEFENDANT-APPELLANT

PROOF OF SERVICE

The undersigned attorney hereby certifies that she has caused a true and correct copy of the foregoing to be served upon Richard Poehling, Assistant United States Attorney for the Eastern District of Missouri, 111 South 10th Street, St. Louis, Missouri 63101 by hand-delivery this 10th day of June, 2005.

Lucy G. Liggett

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(b), the undersigned hereby certifies that this Brief complies with the type-volume limitation. The number of words contained in this Brief, typed in WordPerfect 11, is 4886.

_____
Lucy G. Liggett

CERTIFICATION

The undersigned hereby certifies that the diskette submitted herewith has been scanned for viruses and that it is virus-free.

_____
Lucy G. Liggett

A D D E N D U M